STATE OF MICHIGAN

COURT OF APPEALS

VALERIA GOSHTON,

Plaintiff-Appellant,

v

ARVA OVERTON and BLUE CROSS-BLUE SHIELD,

Defendants-Appellees.

UNPUBLISHED
August 11, 2011

No. 297231
Wayne Circuit Court
LC No. 08-105466-CZ

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order that granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff's claims that defendants' termination of her employment violated the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., and the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*. Plaintiff also challenges the trial court's earlier dismissal of her claim for violation of the Family Medical Leave Act (FMLA), 29 USC 2601 *et seq*.[1] We affirm.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

We first address plaintiff's challenge to the trial court's dismissal of her claims under the PWDCRA and the ADA, each of which preclude an employer from dismissing an employee

[1] There is no merit to defendants' claim that this Court lacks jurisdiction to consider the FMLA claim. Although defendants assert that plaintiff did not timely file an appeal from the March 2, 2010 order dismissing the FMLA claim, the March 2 order was not a final order because it did not dispose of all of plaintiff's claims. The March 9, 2010 order dismissing the disability claims was the final order and plaintiff timely filed a claim of appeal from that order, which encompasses all prior, non-final orders. See *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990).

because of a disability that does not prevent the employee from performing the duties of a particular job. *Peden v City of Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). It is axiomatic that a plaintiff cannot show that an employer fired an employee "because of" a disability unless the decision-maker knows of the disability. See *Cordoba v Dillard's, Inc*, 419 F3d 1169 (CA 11, 2005); *Hedberg v Indiana Bell Tel Co, Inc*, 47 F3d 928 (CA 7, 1995). In that sense, the employer's knowledge of the plaintiff's disability is an element that is frequently added to the prima facie case in ADA cases. 9 Larson, Employment Discrimination, § 156.02[1][c], p 156-11. Regardless of whether a plaintiff is claiming that she is actually disabled or that the employer perceived her as disabled, she "must adduce evidence that a defendant regarded the plaintiff as having an impairment that substantially limited a major life activity—just as with an actual disability." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 475; 606 NW2d 398 (1999). Further, "showing that an employer thought that a plaintiff was somehow impaired is not enough." *Id*.

In this case, the trial court held, and plaintiff does not dispute, that plaintiff's claims required proof that the decisionmaker, defendant Arva Overton, knew that plaintiff was disabled. Defendants presented evidence that Overton was not aware of plaintiff's hypertension. In a later-filed affidavit, plaintiff averred that at an unidentified time in 2007, she told Overton that she was sick and suffered from hypertension. Plaintiff also averred that on another occasion, she felt sick from hypertension and had a very bad headache, which she mentioned to Overton who offered her pain reliever. The affidavit is not clear whether plaintiff told Overton that she was sick from hypertension or just had a very bad headache. But even assuming that plaintiff had communicated to Overton that she had hypertension and occasionally suffered symptoms including headaches, that evidence does not show that Overton knew or thought that plaintiff was "disabled" within the meaning of the ADA and PWDCRA. See *Murphy v United Parcel Serv, Inc*, 527 US 516; 119 S Ct 2133; 144 L Ed 2d 484 (1999) (a plaintiff whose high blood pressure was controlled by medication was not disabled). In fact, plaintiff states in her brief, "It was obvious that Overton did *not* believe that Goshton had a disability . . . ." (Emphasis added.) Because plaintiff did not show the existence of a genuine issue of material fact with respect to whether Overton knew that plaintiff was disabled, which is essential to showing that she was discharged "because of" a disability, the trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's disability claims.

With respect to plaintiff's claim under the FMLA, plaintiff's theory is that Overton discharged her because Overton did not want her to exercise her rights under the FMLA. "The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA." *Woodman v Miesel Sysco Food Serv Co*, 254 Mich App 159, 166-167; 657 NW2d 122 (2002), citing 29 USC 2615(a)(1). The *McDonnell Douglas*[2] burden-shifting analysis that applies to retaliatory discharge cases under the Civil Rights Act and the Whistleblowers' Protection Act[3] also applies to cases alleging

[2] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[3] See *Brown v Mayor of Detroit*, 271 Mich App 692, 709; 723 NW2d 464 (2006), aff'd in part and vacated in part on other grounds 478 Mich 589 (2007).

discrimination or retaliation in violation of FMLA. *Smith v Goodwill Indus of West Mich, Inc*, 243 Mich App 438, 443, 446; 622 NW2d 337 (2000); *King v Preferred Technical Group*, 166 F3d 887, 892 (CA 7, 1999). To establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show:

> (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005) (citation and quotation marks omitted).]

In order to show causation in the context of a retaliation claim under the CRA, the plaintiff "'must show something more than merely a coincidence between protected activity and adverse employment action.'" *Id*. at 286, quoting *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). A causal connection is not established "simply on the basis of timing . . . ." *Garg*, 472 Mich at 287.

In this case, the trial court correctly recognized that the plaintiff's request for leave and her discharge did not show that she was discriminated against because of the request. Echoing the Supreme Court's position in the context of other retaliatory discharge cases, the trial court aptly observed that "temporal proximity is not enough."

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens